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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1778~~ 70-234

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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New Orleans, Louisiana 70112
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IN THE
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FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, First National Bank of Commerce, formerly The National Bank of Commerce in New Orleans, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 9, 1971, rehearing denied March 5, 1971.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana was reported as *United States of America v. National Bank of Commerce in New Orleans*, 309 F. Supp. 979.

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported under the same caption in 438 F. 2d. 809.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 9, 1971, and a timely petition for rehearing was denied on March 5, 1971. This petition for certiorari was filed within 90 days of that date, and the Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Is the decision below in conflict with the rule enunciated by this court in *Clearfield Trust Co. v. U.S.*, 318 U.S. 363, regarding delay or laches as a defense in suits by the government on Treasury checks?

2. Did the court below emasculate the *Clearfield* rule by overturning the trial court's findings of uncontradicted fact that (a) there was delay on the part of the government, and (b) the delay was the cause of the loss?

3. Is the decision below in conflict with numerous decisions of the Supreme Court to the effect that findings of fact by the lower court which are supported by evidence and which are uncontradicted may not be overturned by an appellate court?

4. Does not the decision below constitute dangerous precedent which will encourage laches and negligence on the part of government employees with respect to large numbers of Treasury checks?

STATEMENT OF THE CASE

Pursuant to the instructions given in 1959 by one Clark, the Civil Service Commission forwarded checks, drawn on the Treasury and payable to Clark, to the bank, where Clark maintained a checking account. These checks represented Clark's monthly annuity payments made pursuant to the Civil Service Retirement Act, as amended, 5 U.S.C. 8301, *et seq.* By law, Clark's right to receive these payments would terminate upon his death. 5 U.S.C. 8345(c). The bank indorsed each check for deposit and credited the proceeds to his account. The bank then presented each check for payment through the Federal Reserve Bank in New Orleans, and all checks were in fact paid.

On May 20, 1965, unknown either to the Commission or the bank, Clark died. For nearly two years after Clark's death, the bank continued to receive and credit to the deceased's account twenty-two additional annuity checks sent to the bank.

On or about April 1, 1967, the bank learned that Clark was dead. It immediately so advised the government and returned to the Civil Service Commission the check dated April 1, 1967. Thereafter the government sent no further checks to the bank.

In June, 1967, the Civil Service Commission was contacted by a representative of Clark's heirs, who advised the Commission that his death had occurred "in May of 1965." In July, 1967, an application for death benefits was forwarded to the Commission which contained the more precise information that Clark died on May 20, 1965. The bank however, had no knowledge of the *date* of Clark's death.

On July 24, 1967, Clark's heirs obtained in a Louisiana succession proceeding a judgment acknowledging them to be his sole heirs and entitling them to the possession of the bank account which the deceased had maintained with the bank and which contained the proceeds from the twenty-two annuity checks in controversy. Thereafter, the bank paid over to them the entirety of the balance — or some $7,256 — $7,241 of which consisted of payments to which neither Clark nor his estate were entitled.

In November, 1967, more than seven months after it had been apprised of Clark's death, the United States, for the first time, notified the bank of the overpayment.

The bank, of course, had already paid the money to the heirs of Clark, and it refused to refund the government on the ground that the government had delayed in advising the bank of the loss. Had there been no delay, the bank would not have paid out the money. It should be emphasized that, although the government knew the *date* of Clark's death and, therefore, knew it had overpaid Clark before the bank paid out the

money, the bank did not learn of the government's claim until months after the money had been released.

Thereafter, the United States brought this action against the bank to recover the amount of the overpayment under Title 28, U.S.C., Section 1345. There being no dispute about the facts, cross motions for summary judgment were filed by both parties. The United States District Court for the Eastern District of Louisiana rendered judgment in favor of the bank and against the government. The government took an appeal to the United States Court of Appeals for the Fifth Circuit, which court reversed the lower court, and rendered judgment in favor of the government and against the bank. The respective opinions of the District Court and of the Court of Appeals will be found at the end of this petition.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decisions of this court.

Rule 19 of the rules of this court provides that one of the grounds for granting a writ of certiorari is conflict of the decision below with the decisions of this court.

The Supreme Court in *Clearfield Trust Co. v. U.S.*, 318 U.S. 363, at page 369 said:

> "The *National Exchange Bank* case went no further than to hold that prompt notice of the

> discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred."

The U.S. District Court for the Eastern District of Louisiana in the present case said in its opinion (see Appendix, *infra*):

> "The Civil Service Commission had notice of the fact of Clark's death in April, 1967, and of the date of his death on or about June 23, 1967. Armed with this information, as well as the names of attorneys for the Clark succession, the Civil Service Commission took no action to reclaim the improvidently paid retirement benefits.
>
> * * * *
>
> Had the Government taken prompt (or, under these facts, even less than prompt) action, no loss would have been sustained by any party."

The District Court based these findings of fact on *uncontradicted* evidence in the record, and ruled in favor of the bank. Nevertheless, the U.S. Court of Appeals for the Fifth Circuit reversed the trial court, saying, among other things, the following:

> "We disagree with the District Court that the loss, if any, was caused by failure of the Government to act promptly . . . Demand was made on the Bank within seven to eight months after notification of death .... While there is dictum in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573 (1943), relied on by the District Court here, that lack of prompt notice by the drawee of a Treasury check in notifying the presenting bank of a forged indorsement, may bar recovery by the drawee, this is not such a case."

There are, generally speaking, two ways in which a Court of Appeals may render a decision in conflict with the Supreme Court rule. It may simply ignore the rule. Or it may pay lip service to the rule and refuse to enforce it by finding the facts to be such that the rule is not applicable.

The Court of Appeals for the Fifth Circuit has followed the second course in this case. It has paid lip service to the Supreme Court rule, but refuses to follow it. It has distorted the facts, and, indeed, has reversed the District Court's findings of fact which are supported by uncontradicted evidence.

But here is where the Court of Appeals manages to contravene the well established rule of the Supreme Court that appellate courts may not reverse the District Court's findings of fact when supported by uncontradicted evidence. See the following cases:

Davis v. Schwartz, 155 U.S. 631, 636-637;
Adamson v. Gilliland, 242 U.S. 350, 353.
Vicksburg, etc., Ry. Co. v. Anderson-Tulley Co., 256 U.S. 408.
U.S. v. Wells, 283 U.S. 102
U.S. v. Jefferson Electric Co., 291 U.S. 386.
Alabama Power Company v. Ickes, 302 U.S. 464, 477.

II. The decision below establishes dangerous precedent with respect to large numbers of Treasury checks issued to deceased payees.

The government, in its brief, has stated that more than 500 million Treasury checks were issued in 1965, and that the number has increased in each subsequent year. A substantial number of these are issued and deposited in error to the account of deceased payees who are not entitled to the payments after death. For example, Social Security payments and Civil Service retirement benefits fall into this category. It becomes important as a matter of national policy, therefore, to determine when the bank, in such cases, is liable to the government. Under the *Clearfield Trust Company* case, *supra*, the bank is *not* liable when the government has delayed in notifying the bank of its claim and when such delay is the cause of the loss.

The present case is a classic case for application of the *Clearfield Trust Company* rule. There was delay, and the delay was the direct cause of the loss. Nevertheless, the Court of Appeals for the Fifth Circuit, in an attempt to avoid application of the rule, has not

only emasculated the Supreme Court's rule in the *Clearfield* case, but it has in the process violated the well established Supreme Court rule that findings of fact by the District Court, when supported by uncontradicted evidence, will not be overturned.

This decision, if allowed to stand, will become a dangerous precedent that will encourage laches and delay on the part of government employees. If the government is not guilty of delay in the present case, it is difficult to imagine a case where the *Clearfield* rule will apply. Government employees will adopt the attitude that they do not have to notify banks promptly of errors in payment, and innocent banks will become guarantors of government negligence. Certainly this is not a desirable result by any standard. Furthermore, by reversing the District Court's findings of fact, this decision will encourage litigants to take appeals in the hope that the District Court's factual findings will be revised.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HENRY P. DART, III
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New Orleans, Louisiana 70112
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 1971, three copies of the foregoing petition for Writ of Certiorari were mailed, postage prepaid to Alexander P. Humphrey and Gerald J. Gallinghouse, Counsel for the United States.

HENRY P. DART, III

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA

No. 69-271

versus

CIVIL ACTION
SECTION D

NATIONAL BANK OF COMMERCE
IN NEW ORLEANS

Charles H. White, Esq.
Asst. U. S. Attorney
For Plaintiff-Mover

Henry P. Dart, III, Esq.
For Defendant-Mover

BOYLE, District Judge:

This is an action by the United States of America against the National Bank of Commerce in New Orleans, hereafter referred to as the Bank, to recover the proceeds of twenty-two Treasury checks presented by the Bank to and paid by the plaintiff as drawee.

Cross motions for summary judgment brought by the plaintiff and the defendant came on for hearing on January 21, 1970. After submission of memoranda and oral argument, this matter was submitted to the

Court for adjudication, there being no dispute as to the material facts involved.

The facts, appearing in the verified pleadings, and affidavits made a part of the record, are as follows:

Prior to May, 1965, Raymond Durwood Clark, Sr., a retired Civil Service employee, maintained a checking account, No. 0026-23-042, in the main office of the defendant Bank.

The Civil Service Commission, pursuant to Clark's request, mailed his retirement benefit checks to the Bank for deposit to his account, which checks were so deposited.

On May 27, 1965, unknown to the Bank or the Civil Service, Clark died. The Civil Service continued to mail checks payable to Clark to the Bank for deposit to his account.

The Clark heirs took no immediate steps to institute probate proceedings or to notify the Bank or the Government of Clark's death. On or about April 1, 1967, the heirs notified the Bank of the fact, but not the date, of Clark's death. When the next retirement check from the Civil Service payable to Clark arrived, the Bank returned the check with a notice that the payee had died.

On June 23, 1967, Joseph Defley, Jr., attorney, Port Sulphur, Louisiana, wrote a letter on behalf of the Clark heirs to the Bureau of Retirement and Insur-

ance, U. S. Civil Service Commission, Washington, D. C., advising the Civil Service that Clark died in May, 1965. Civil Service did not notify the Bank that it had a claim for refund of the money represented by the checks issued between May, 1965, and April, 1967, nor did it notify the heirs or the attorneys for the decedent's estate that it had any claim of any nature against Clark's estate. On the contrary, Civil Service records indicate that when the heirs presented their claim for benefits under the Federal Employees' Group Life Insurance Plan in July, 1967, the Commission referred the heirs to the Office of Federal Employees' Group Life Insurance for payment. A claim form was submitted by the heirs through Mrs. Adelaide Baudier, attorney, New Orleans, Louisiana, dated July 11, 1967, which claim was acknowledged under date of July 26, 1967, by the Office of the Federal Employees' Group Life Insurance, copies of which documents are a part of the record herein. Pursuant to this claim and acknowledgment, in July, 1967, the Federal Employees' Group Life Insurance paid the Clark heirs Five Thousand Six Hundred Dollars ($5600.00) in insurance benefits.

On July 24, 1967, Judge Clarence Dowling of the Civil District Court for the Parish of Orleans, in proceedings No. 466-245, Succession of Raymond Durwood Clark, Sr., signed a judgment of possession recognizing the named heirs as Clark's sole heirs, and sending them into possession of his entire estate, and, more particularly, Account No. 0026-23-042, standing in the name of the deceased in the defendant Bank. A certified copy of this judgment of possession was presented

to the defendant Bank, and thereafter, the Bank delivered a check covering the entire balance remaining in the account, payable to the heirs, to the attorney for the succession. This occurred some four months after the Bank returned Clark's April, 1967, check to the Civil Service with the advice that Clark was then deceased, and one month after an attorney for the Clark heirs had written Civil Service advising of Clark's death in May of 1965.

In November or December of 1967, more than four months after the Bank had issued its check payable to the heirs, and some five months after the Civil Service had known that Clark died in May, 1965, the Civil Service first notified the Bank that Civil Service retirement checks to which Clark was not entitled had been paid into his account.

The Government demanded refund by the Bank, whereupon the Bank advised the Government that it had disbursed the funds to the heirs, and suggested that the Government make its claim against the heirs. The Government replied by filing this suit against the Bank for recovery of Seven Thousand Two Hundred Forty-One Dollars ($7241.00).

Counsel for the Government contends that, under Title 31, Code of Federal Regulations, Section 360.5,[1]

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[1] 31 C.F.R. 360.5:

"The Treasurer shall have the right to demand refund from the presenting bank of the amount of a paid check if after payment the check is found to bear a forged or unauthorized indorsement or an indosrement by another for a deceased payee

the Government can recover from the defendant Bank on Government annuity checks issued to a deceased payee when the Bank guaranteed the absence of the payee's indorsement. It is the Government's position, further, that the Treasurer is not precluded from recovering merely because the Civil Service Commission failed to act timely after being informed of the payee's death.

The Bank contends initially that the Government has not suffered any loss since it has an available remedy under Louisiana law to proceed against the heirs to recover the amount erroneously deposited to Clark's account by the Civil Service Commission. Defendant further contends that any loss which the Government may suffer in this matter has been occasioned by the

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where the right to the proceeds of such check terminated upon the death of the payee, or to contain any other material defect or alteration which was not discovered upon first examination. If refund is not made, the Treasurer shall take such action against the proper parties as may be necessary to protect the interests of the United States."

31 C.F.R. 360.8(b) indicates the nature of the "indorsement" made by the defendant bank:

"When a check is credited by a bank to the payee's account under his authorization, the bank may use an indorsement substantially as follows:

"Credit to the account of the within-named payee in accordance with payee's or payees' instructions. Absence of indorsement guaranteed.

XYZ Bank.

"A bank using this form of indorsement shall be deemed to guarantee to all subsequent indorsers and to the Treasurer that it is acting as an attorney in fact for the payee or payees, under his or their, authorization."

This form was precisely that used by the defendant on the checks credited to Clark's account.

neglect or delay of its agents. The Bank further specially pleads the Government's laches as a defense to this action.

Under the facts of this case, as shown in the verified pleadings and uncontroverted affidavits and exhibits made a part of the record herein, it appears that the loss, if any, of which the Government complains was caused solely through the fault, neglect and delay of its own agents. In this suit, the Government seeks to place the onus of this negligence on the Bank who, it appears, acted in good faith and with due diligence throughout.

The Civil Service Commission had notice of the fact of Clark's death in April, 1967, and of the date of his death on or about June 23, 1967. Armed with this information, as well as the names of attorneys for the Clark succession, the Civil Service Commission took no action to reclaim the improvidently paid retirement benefits.

Upon receipt of notice of the date of death, the Government had a choice of at least three courses of conduct, each of which would have led to the recovery of the sum in dispute had its agents acted properly. Having been notified of the names and addresses of counsel for the Clark heirs, the Government could have appeared in the succession proceedings before the Orleans Civil District Court as a creditor of the Clark estate. Having failed to do so, the Civil Service Commission could have alternatively withheld payment of the deceased's insurance benefits pending return by

the heirs of the retirement benefits. The Civil Service Commission, however, referred the heirs to its insurance office for payment of the insurance claim.

There remains to the Government a third avenue to recovery of these disputed benefits, under the Louisiana Civil Code, Article 1422,[2] by institution of a personal action against the heirs to discharge the debts of the deceased.

This case is readily distinguishable from the forgery and fraud cases cited by plaintiff in support of its position.[3] In the instant case, when the Government discovered the facts giving rise to its alleged loss, there had not yet been a loss, since the money was still in the Bank's hands, safely reposing in the Clark checking account.

Had the Government taken prompt (or, under these facts, even less than prompt) action, no loss would have been sustained by any party. This Court is unwilling to inflict a loss on the Bank where there has been no showing of a loss by the Government or of a causal relation between that loss and any prejudicial actions by the defendant Bank after it became aware of the date of Clark's death.

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[2]La. Civ. Code, Art. 1422, which reads in pertinent part:

"The personal action, which the creditors of a succession can exercise against the heirs, has for its basis the obligation, which the heirs are under, to discharge the debts of the deceased."

[3]*Metropolitan Bank* v. *U.S.*, 323 U.S. 454, 65 S.Ct. 354, 89 L.Ed. 383 (1945); *U.S.* v. *National Exchange Bank*, 214 U.S. 302, 29 S.Ct. 665 (1909); *Jones* v. *U.S.*, 106 F.2d 888 (5th Cir. 1939); *U.S.* v. *Kiefer*, 228 F.2d 448 (D.C. App. 1955).

The Bank acted in good faith in paying out an account listed in a judgment of possession, under authority of La. R.S. 6:66.[4] It would be unreasonable to then hold the Bank responsible for knowledge in the possession of Government agents, upon which those agents, through their own inattention, failed to act.

It is the opinion of this Court that the instant case presents an opportunity for the application of the defense of lack of prompt notice set out in the *Clearfield Trust* case.[5] In that case, the Supreme Court noted:

> "The National Exchange Bank case went no further than to hold that prompt notice of the discovery of the forgery was not a condition precedent to suit. It did not reach the question whether lack of prompt notice might be a defense. We think it may. If it is shown that the drawee on learning of the forgery did not give prompt notice of it and that damage resulted, recovery by the drawee is barred. [ci-

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[4]La. R.S. 6:66, which reads in pertinent part:

"Upon proper authority and upon obtaining a receipt therefor, any bank may transfer any money or other property in its possession, belonging to a deceased person, to the decedent's succession representative, heirs, or the legal representatives of the heirs.

"The letters of the succession representative or the judgment recognizing and putting the heirs in possession, issued by a court of competent jurisdiction, and accompanied by letters of tutorship or curatorship of the heirs who are not sui juris, shall constitute proper authority for making the transfer, which when so made and receipted for *shall be full protection to the bank.*" [Emphasis added]

[5]*Clearfield Trust Co., et al v. U.S.*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

> tations omitted] The fact that the drawee is the United States and the laches those of its employees are not material. Cooke v. Natl. Exchange Bank, 270 US 527, 534, 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.' Id., p. 535 .... Cases such as Market St. Title and Trust Co., supra, place the burden on the drawee of giving prompt notice of the forgery-injury to the defendant being presumed by the mere fact of delay."

In the instant case, the facts are even stronger, since the uncontroverted evidence shows that not only did the Government have reason to presume that something was amiss, but it had actual knowledge from its records and the correspondence from Attorney Defley and from the Bank that retirement benefits had been paid to Clark after the date of his death. The conditions for a successful defense of lack of prompt notice set forth in *Clearfield Trust* are met in the present factual context.

For the foregoing reasons,

IT IS ORDERED that the Motion of the United States for a summary judgment in its favor against the National Bank of Commerce in New Orleans be, and it is hereby, DENIED.

IT IS FURTHER ORDERED that the Motion of the National Bank of Commerce in New Orleans for a summary judgment in its favor dismissing the complaint of the United States be, and it is hereby, GRANTED.

/s/ EDW. J. BOYLE, SR.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 29, 1970

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29698

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

NATIONAL BANK OF COMMERCE
IN NEW ORLEANS,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(February 9, 1971)

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge: This action was brought by the United States of America on behalf of the Treasury Department to recover the proceeds of twenty-two Treasury checks in the total sum of $7,241 from the National Bank of Commerce in New Orleans, Louisiana.[1] The complaint was based on a written contract of guaranty and for money paid by mistake subsequent to the death of Raymond D. Clark, payee on the Treasury checks. All of the checks were indorsed and negotiated by the Bank after Clark's death. The Government and the Bank filed cross-motions for summary judgment. The District Court denied the motion of the Government and granted that of the Bank, dismissing the complaint. The Government appeals from that judgment. The District Court, in finding for the Bank, was of the opinion that "The loss, if any, of which the Government complains was caused solely through the fault, neglect and delay of its own agents" and that the Bank "acted in good faith and with due diligence throughout." Without impugning lack of good faith to either party, we reverse for reasons which follow.

A chronology of the pertinent facts follows:

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[1]The sum of $212.67, representing annuity benefits accrued from May 1 to May 20, 1965, is presently payable to the heirs of Raymond D. Clark, which amount the Government is withholding pending the outcome of this litigation.

In December 1959, Clark, a retired Civil Service employee, requested the United States Civil Service Commission to send his monthly annuity checks to the National Bank of Commerce in New Orleans for deposit to his checking account. The checks were accordingly forwarded. The Bank in turn indorsed the checks, credited them to Clark's account, and presented them for payment to the Treasurer of the United States.

On May 20, 1965, Clark died, thereby terminating his right to these annuity checks. 5 U.S.C. § 8345(c). The fact that Clark died was not communicated to either the Bank or the Government. For almost two years thereafter the checks continued to be sent to the Bank which deposited them as formerly. Nineteen of the twenty-two checks at issue bear the following indorsement:

"Credited to the account of
the within-named payee
Absence of payee's endorsement guaranteed
The National Bank of Commerce
in New Orleans"

Two of the checks bore the Bank's indorsements similarly styled:

"Pay any bank, P. E. G."

The indorsement by the Bank on the remaining check reads:

"Through New Orleans Clearing House
or pay to the order of any
bank, banker or trust co.
All prior endorsements guaranteed"

On or about April 1, 1967, Clark's heirs notified the Bank of payee's death but not of the date thereof. When the April 1, 1967 annuity check was received by the Bank it returned it to the Civil Service Commission with a notation that payee had died.

On June 23, 1967, an application for death benefits under the Federal Employees' Group Life Insurance Plan was made by the Clark heirs to the Civil Service Retirement System, on which the date of death was shown to be May 27, 1967. (The correct date of death was later verified as May 20, 1965.) Pursuant to the claim, the sum of $5,600, representing insurance benefits, and forming no part of the amount at issue, was paid to the heirs. These benefits, however, were not paid through the Civil Service Commission but directly through the Metropolitan Life Insurance Company from which the Commission purchases all Federal Group Life Insurance policies. See 5 C.F.R. §§ 870.101 and 871.101.

On July 24, 1967, an ex parte judgment of possession was rendered by the Civil District Court for the Parish of Orleans, Louisiana, in the Succession of Clark, sending the heirs into possession of Clark's estate, particularly the bank account in the name of the deceased. Upon presentation of a certified copy of the judgment,

the Bank delivered to counsel for the heirs a check in the sum of $7,256.22, covering the balance remaining in Clark's account.

Finally, on November 29, 1967, the Government notified the Bank by letter that it was demanding refund of the amount of overpayment to the heirs, represented by the twenty-two checks, whereupon the Bank advised that it had disbursed the funds to the heirs. This suit by the Government against the Bank for recovery of the sum of $7,241 followed.

The Government contends that a uniform federal rule governs the rights and liabilities of the United States on treasury paper, that this rule is incorporated in the pertinent Federal Regulations issued by the Department of the Treasury, under which the Bank is liable as guarantor. The Bank contends, on the other hand, that the Federal Regulations are inapplicable, that it is fully protected by Louisiana law,[2] and that it was incumbent on the Government to inform it that the deceased was not entitled to the checks dated subsequent to payee's death. Each party contends that the other is guilty of laches.

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[2]Louisiana Statutes Annotated-R. S. 6:66 provides in pertinent part the following:

> "Upon proper authority and upon obtaining a receipt therefor, any bank may transfer any money or other property in its possession, belonging to a deceased person, to the decedent's . . . heirs . . . ."
>
> "The . . . judgment recognizing and putting the heirs in possession, issued by a court of competent jurisdiction, . . . shall constitute proper authority for making the transfer, which when so made and receipted for shall be full protection to the bank."

The applicable Federal Treasury Regulations, in effect between 1965 and 1967, the relevant period herein, provide in pertinent part as follows:[3]

31 C.F.R. § 360.0:

"The indorsement of checks drawn on the Treasurer of the United States shall be governed by the regulations in this part. . . ."

§ 360.2:

"The presenting bank and the indorsers of a check presented to the Treasurer for payment are deemed to guarantee to the Treasurer that all prior indorsements are genuine including that of the drawer when the check is drawn in the drawer's favor, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasurer, in addition to other warranties, that the person who so indorsed had unqualified capacity and authority to indorse the check in behalf of or in lieu of the payee."

§ 360.4:

"(a) Checks issued for the following classes of payments, the right to which does not ter-

[3]These Regulations are in substance identical to the present Regulations now in force. See 31 C.F.R. §§ 360.8-12 (1970).

minate with the death of the payee, will when indorsed by an executor or administrator be paid by the Treasurer without the submission to the Treasurer of documentary proof of the authority of the executor or administrator: ...

"(b) *Other classes of checks must not be negotiated after the death of the payee but must be returned to the drawer or to the administrative office which authorized issuance of the check for determination whether, under applicable laws, payment is due and to whom it may be made. Examples of these classes of checks are as follows:*

....

"2. *Annuities.*

...." (Emphasis supplied.)[4]

It is not disputed that Clark's right to the annuity checks terminated at his death. It is equally clear that the Bank had no authority to negotiate the instruments after that time.

This suit by the Government was filed pursuant to 31 C.F.R. § 360.5 (Supp. 1967), which accords the Treasurer the "right to demand refund from the presenting bank of the amount of a paid check if after

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[4]Appellee Bank, at some length, discusses the inapplicability of 31 C.F.R. § 360.3 to the facts of this case. The argument is wide of the mark however, as the Government correctly points out, since no reliance upon Section 360.3 is made by the United States in the present matter.

payment the check is found to bear a forged or *unauthorized* indorsement or an indorsement by another for a deceased payee where the right to the proceeds of such check terminated upon the death of the payee. . . ." (Emphasis supplied.) Under the express warranty, stamped by the Bank on the reverse side of each check, and the Federal Regulations above quoted, we find the Bank liable.

We disagree with the District Court that the loss, if any, was caused by the failure of the Government to act promptly. It was the Bank and not the Government which first learned of Clark's death through his heirs. The Government had no knowledge of payee's death until the Bank notified it. The Government immediately discontinued forwarding the checks to the Bank. Demand was made on the Bank within seven to eight months after notification of death. It is pertinent to note at this point that the period of limitation for the Government to institute this proceeding to enforce the liability of the Bank as indorser, growing out of an unauthorized signature on a Government check, is six years. See 31 U.S.C. § 129. While there is dictum in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573 (1943), relied on by the District Court here, that lack of prompt notice by the drawee of a Treasury check in notifying the presenting bank of a forged indorsement, may bar recovery by the drawee, this is not such a case. In *Clearfield*, the Court expressly rejected the defense of laches in the absence of proof of damage, stating, "But the damage occasioned by the delay must be established and not left to conjecture." 318 U. S. at 369, 63 S. Ct. at 576.

We do not consider the lapse of time before demand was made in the instant case as constituting lack of due diligence on the part of the Government. This is particularly true where, as in the instant case, the presenting bank first became aware of the circumstances which bore on the negotiability of the instruments. Due diligence by the Bank upon learning of payee Clark's death, would have caused the Bank to retain the funds in its possession in deceased Clark's account, until it could be determined whether the proceeds belonged to the deceased. Without having resolved any of these questions, and without notifying the Government, the Bank chose to deliver to the heirs the proceeds of the account, to which they were not entitled. In doing so the Bank acted at its own peril. The equitable principles of *Price v. Neal*, 3 Burrows 1355 (1762), relied on by the appellee, are accordingly inapposite to the Bank's position.

The *Clearfield* case supports the Government's contention. In that case the Supreme Court held state law to be inapplicable in an action brought by the United States to recover on a check drawn on the Treasurer of the United States on April 28, 1936. The check was mailed to the payee, an employee under the Works Progress Administration. The check was intercepted by another, forged, and presented to the J. C. Penney Company which indorsed it over to the Clearfield Trust Company. Clearfield accepted the check for purposes of collection and indorsed it as follows: "Pay to the order of Federal Reserve Bank of Philadelphia, Prior Endorsements Guaranteed." This type of guarantee was required by Treasury Regulations, 31 C.F.R.

§§ 202.32, 202.33. On or before May 10, 1936, payee informed his foreman and timekeeper that he had not received the check in question, which information was "duly communicated to other agents of the United States." 318 U. S. at 365, 63 S. Ct. at 574. On November 30, 1936, payee executed an affidavit alleging that the indorsement was a forgery. Clearfield Trust and J. C. Penney Company were notified of the forgery on January 12, 1937. Approximately 7-1/2 months later, on August 31, 1937, the Government notified Clearfield Trust Company that it was asking for reimbursement and later filed an action to recover. The District Court held that the law of Pennsylvania governed and that the United States was barred from recovery because of its unreasonable delay in notifying Clearfield of the forgery. The Court of Appeals for the Third Circuit reversed (130 F. 2d 93) and the Supreme Court affirmed the Circuit Court in the following language:

> "We agree with the Circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R., 1487, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115, 15 U.S.C.A. §§ 721-728. The authority to issue the check had its origin in the Constitution and the statutes of the United

States and was in no way dependent on the laws of Pennsylvania or of any other state. [Citations omitted]. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. [Citations omitted]. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.

"In our choice of the applicable federal rule we have occasionally selected state law [Citation omitted]. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant developed for about a century under the regime of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source

of reference for fashioning federal rules applicable to these federal questions.

> "United States v. National Exchange Bank, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184, falls in that category. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice of the forgery. ..." 318 U. S. at 366-368, 63 S. Ct. at 574, 575.

In *Fulton Nat. Bank v. United States*, 5 Cir., 1952, 197 F. 2d 763, 764, we followed the reasoning in *Clearfield*, in holding that the rights and duties of the United States in disbursing funds and paying debts, being constitutional functions, are governed by federal law rather than local law, and that in the absence of delay occasioned by the Government and actual resultant injury to the presenting bank the United States was not barred from recovery. We find no substantial distinction between the instant case and the forgery cases cited. The delay was not due to fault by the Government. Furthermore, the Bank has its remedy against the heirs to recover monies erroneously paid to them.

Under the circumstances, summary judgment was appropriate, but should have been granted in favor of the United States.

REVERSED.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29698

D. C. Docket No. CA 69-271

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus

NATIONAL BANK OF COMMERCE IN
NEW ORLEANS,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before RIVES, AINSWORTH and MORGAN,
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1971

Issued As Mandate:

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29698

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
versus

NATIONAL BANK OF COMMERCE
IN NEW ORLEANS,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 5, 1971)

ON PETITION FOR REHEARING

Before RIVES, AINSWORTH and MORGAN,
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-234

FIRST NATIONAL BANK OF COMMERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a–21a) is reported at 438 F. 2d 809. The opinion of the district court (Pet. App. 1a–10a) is reported at 309 F. Supp. 979.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1971 (Pet. App. 22a–23a). A timely petition for rehearing was denied on March 5, 1971 (Pet. App. 24a). The petition for a writ of certiorari was filed on June 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly decided that, in the circumstances of the case, the defense of laches was not available to the defendant.

STATEMENT

In 1959, Raymond D. Clark, a retired government employee, instructed the Civil Service Commission to send his monthly retirement annuity checks directly to his bank for deposit in his checking account. Thereafter, the bank, petitioner herein, received the checks directly, endorsed them on behalf of Clark, and presented them to the Treasurer of the United States for payment (Pet. App. 12a). Unknown to the bank or the government, Clark died on May 20, 1965. His annuity checks, however, continued to be sent and the bank continued to present them for payment. Nearly two years later, in April 1967, Clark's heirs notified the bank that Clark had died; but the heirs apparently did not inform the bank of the date of Clark's death and the bank did not inquire about this (Pet. App. 13a). At that time, Clark's account contained $7256.22, of which $7241 represented the proceeds of the 22 checks sent since Clark died (Pet. App. 14a).

Since Clark's right to receive the payments terminated at his death (5 U.S.C. (Supp. V) 8345(c); 31 C.F.R. Part 360) the bank returned the April 1967 check to the Civil Service Commission with a notation that Clark had died. The government then stopped sending further checks. In late June the Civil Service Commission received a letter from an attorney repre-

senting Clark's heirs which noted that Clark had died in May of 1965. An application for death benefits received in mid-July contained a similar statement. (Pet. App. 2a–3a; 13a.)

In late July, without having ascertained the date of Clark's death, the bank released all the funds in Clark's account to his heirs after the heirs presented a copy of a succession judgment putting them in possession of the account (Pet. App. 13a–14a).

Meanwhile the government, not realizing that the bank did not know the date of Clark's death or that it was about to and did release funds without ascertaining this information, processed the case in the normal manner. The Office of the Treasurer, to whom the case was referred by the Civil Service Commission, assembled and identified the 22 checks in question, and in November 1967 made a formal demand on the bank for the amount of the proceeds of these checks. The bank advised that it had already turned the proceeds over to the heirs, and denied liability. The government then commenced this action against the bank for $7241 (Pet. App. 14a).

The district court granted the bank's motion for summary judgment on the ground that the government suit was barred by laches, citing *Clearfield Trust Company* v. *United States*, 318 U.S. 363. (Pet. App. 8a–9a.) The court of appeals reversed, holding that the presenting bank was clearly liable by virtue of its endorsements guaranteeing that it had unqualified authority to obtain payment of the checks on behalf of Clark, 31 C.F.R. Part 360, and that the defense of

laches was not available on the facts of this case (Pet. App. 17a, 18a–20a).

ARGUMENT

The court of appeals correctly rejected the bank's defense of laches. As the court pointed out, the bank itself "first became aware of the circumstances which bore on the negotiability of the instruments" (Pet. App. 18a). The bank had actual knowledge of the fact of its customer's death in April 1967; at that time the bank could easily have inquired about the date of death and certainly should have had this information before it released the funds in July. This case is thus unlike the alteration or forgery cases where the presenting bank has "no means of knowledge" nor "the least privity or suspicion" of the pertinent facts. See *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333, 343 (fraudulently raised bank-notes of payor); *Price* v. *Neal*, 3 Burr. 1355, 1357 (drawer's signature forged).

The government did not unreasonably delay in presenting its demand. It had no reason to suspect that the bank, which informed the government of Clark's death, would be ignorant of the date of death. The government was not obligated to inform the bank that checks issued after Clark's death could not be presented to the Treasurer; indeed, the bank's return of the April 1967 check indicates that it was well aware of this. In short, the bank, not the government, failed to exercise due diligence in these circumstances, and accordingly acted at its own peril in releasing the proceeds to the heirs.

Contrary to petitioner's contention, the decision below does not conflict with *Clearfield Trust* v. *United States,* 318 U.S. 363. As the Court there stressed, the defense of laches applies only where "damage resulted" from a failure to give prompt notice; the "damage occasioned by the delay must be established and not left to conjecture." 318 U.S. at 369. In *Clearfield* the Court pointed out that so far as appeared the defending bank could recover from its endorser and thus had not shown that it had suffered damages from the government's delay. *Id.* at 370. Here, petitioner made no showing that it could not have recouped from the heirs after the government made its formal demand in November 1967. Compare *Ladd and Tilton Bank* v. *United States,* 30 F. 2d 334, 337 (C.A. 9), cited in *Clearfield, supra,* 318 U.S. at 369. The court of appeals therefore properly rejected the bank's defense of laches.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1971.

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